

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 11 Case
	)	Number <u>89-10313</u>
GEORGIAN ARMS PROPERTIES,)	
A California Limited Partnership	)	FILED
F.E.I. #95-3494889	)	at 3 O'clock & 18 min. P.M.
	)	Date: 3-1-90
Debtor)	
)	
WINDOVER PROPERTIES,	)	Chapter 11 Case
A California Limited Partnership	)	Number <u>89-10314</u>
F.E.I. #95-3494890)	
	)	Consolidated for
Debtor	)	Administrative and
	)	Procedural Purposes
	)	under Case
	)	Number 89-10313

ORDER

Georgian Arms Properties and Windover Properties, both California Limited Partnerships (hereinafter collectively "debtor") separately filed for relief under Chapter 11 of Title 11 United States Code on March 6, 1989, and were subsequently ordered to be jointly administered and consolidated for procedural purposes. Along with the initial voluntary petition for relief and pursuant to 11 U.S.C. 327, 328, 329 and Bankruptcy Rule 2016(b)¹ the firm

¹ 11 U.S.C. §327 provides in part

(a) . . . the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist ' the trustee in carrying out the trustee's duties under this title [title 11].

11 U.S.C. §328 provides in part:

(a) The trustee . . . with the court's approval, may employee or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, or an hourly basis, or on a contingent fee basis.

of Sutherland, Asbill & Brennan and Mr. J. Benjamin Kay, III, attorney at law, sought appointment as counsel for the debtor-inpossession in each case and disclosed the payment to them in the

Windover Properties case of Twelve Thousand and No/100 (\$12,000.00) Dollars and in

Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. §329 provides in part:

(a) Any attorney representing a debtor in a case under this title [title 11], or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid
. . . .

Bankruptcy Rule 2016(b) provides in part:

(b) Every attorney for a debtor, whether or not the attorney applies for compensation, shall file with the court within 15 days after the order for relief . . . the statement required by §329

the Georgian Arms Properties case of Twenty-Eight Thousand and No/100 (\$28,000.00) Dollars, totaling Forty-Thousand and No/100 (\$40,000.00) Dollars. The disclosure provided in relevant part:

5. The purpose of the payment was to compensate the firm [Sutherland, Asbill & Brennan] and J. Benjamin Kay, III, a member of the bar of this court, for services rendered in contemplation of this case or to be rendered in connection with this case by the firm and Mr. Kay.

6. The retainer will be charged by the firm and by Mr. Kay for the value of services rendered at the standard hourly rates charged by the firm and by Mr. Kay and for out-of-pocket expenses incurred.

By order dated March 22, 1989 the application for employment of Sutherland, Asbill & Brennan and J. Benjamin Kay, III as attorneys in this case under Chapter 11 of the Bankruptcy Code was approved. The order provided that the compensation for such attorneys was to be later fixed and determined by this court in such manner as the court may from time to time direct. The United States Trustee has objected to the amount of retainer.

This consolidated Chapter 11 proceeding involves a single asset, an apartment complex in Richmond County, Georgia. The apartment complex is being managed and operated as a going concern and is generating rental income. According to the debtor's schedules, as of the date of filing their petitions, the debtor had cash on hand in the amount of Five Thousand Seven Hundred Seventy-Five and 08/100 (\$5,775.08) Dollars. The payment of the FortyThousand and No/100 (\$40,000.00) Dollars did not render the debtor incapable of operating as a going concern. The fund paid may be held by counsel pending further order of this court, and, therefore, the objection of the United States Trustee is overruled.

The use of the word "retainer" in an attorneys fee agreement to describe a payment by a debtor to an attorney before the filing of a contemplated Chapter 11 bankruptcy petition is in most instances confusing and misleading. Retainer is defined as "the act of the client in employing his attorney or counsel, and also denotes the fee which the client pays when he retains the attorney to act for him, and thereby prevents him from acting for his adversary. The term can mean

a fee not only for the rendition of professional services when requested, but also for the attorney taking the case, making himself available to handle it, and refusing employment by plaintiff's adversary; or it can mean solely the compensation for services to be performed in a specific case." Black's Law Dictionary 1183 (5th ed. 1979). Under this definition, a retainer paid is a fee paid to the attorney and earned by the attorney upon the attorney agreeing to represent the debtor in the bankruptcy proceeding. The funds paid to an attorney in contemplation of representing a debtor in a bankruptcy petition may in fact be a "retainer" if the fee paid is a flat fee for all services to be performed in the specific case. This is usually the situation in Chapter 7 proceedings. However, in this Chapter 11 case, the payment to the attorneys was not contemplated as a flat fee for all services, and, therefore, was not by definition a "retainer". The disclosure filed by counsel pursuant to Bankruptcy Rule 2016 provided that the "retainer" was to be used by the attorneys to pay them for the value of services charged at an hourly rate rendered in contemplation of this bankruptcy petition. The order of this court approving employment of attorneys for the debtor based upon the application submitted provided that "compensation for such attorneys [was] to be later fixed and determined by the court in such manner as the court may from time to time direct." The payment of Forty-Thousand and No/100 (\$40,000.00) Dollars to the attorneys for the debtor in this Chapter 11 proceeding was meant to secure the payment of the first Forty-Thousand and No/100 (\$40,000.00) Dollars in fees earned by debtor's counsel in this case. The payment was meant to secure at least partially the future payment of an unknown amount of services to be rendered on behalf of the debtor in the future, and as such, this payment remains property of the estate until awarded to the attorney by court order on appropriate application, notice and hearing. In re: Chicago Lutheran Hospital Association, 89 B.R. 719 (Bankr. N.D. Ill. 1988). To provide otherwise would completely circumvent the oversight responsibilities of this court of professional compensation as set

U.S.C. §330.²

"Attorneys fees in bankruptcy cases can be quite large and should be closely examined by the court." 124 Cong. Rec. H11091-92 (dailey ed. Sept. 28, 1978); S17408 (dailey ed. Oct. 6, 1978) (remarks of Rep. Edwards and Sen. DeConcini). The previously referenced Bankruptcy Code and Rule provisions provide for this oversight of attorney fees, and the provisions of 11 U.S.C. 329(b) and Bankruptcy Rule 2017³ provide protection against and remedy to the

²11 U.S.C. §330 provides in part:

(a) After notice to any parties in interest and to the United States Trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award . . . to the debtor's attorney

(1) reasonable compensation for actual, necessary services rendered by such attorney . . . based on the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual, necessary expenses.

³11 U.S.C. 329(b) provides in part:

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive

Bankruptcy Rule 2017 provides in part:

(a) On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor . . . to an attorney for services rendered or to be rendered is

estate and all interested parties for overreaching by debtor's counsel regardless of whether the agreement with the attorney was for the payment of a retainer, a flat fee in contemplation of all services, or a fund to the attorney to secure the payment of future undetermined fees. In the approval of reasonable attorney's fees, this court must follow the "lodestar" method of determination adopted by the United States Court of Appeals for the Eleventh Circuit in Norman v. Housing Authority for the City of Montgomery, 836 F.2d 1292 (11th Cir. 1988). See also In re: Curtis, 83 B.R. 853 (Bankr. S.D. Ga. 1988).

Barring a clear expression of an understanding between the debtor and debtor's attorney that the payment to the attorney made prior to the filing of a Chapter 11 bankruptcy petition and in contemplation of that petition is a flat fee for all services to be rendered by the attorney in connection with the bankruptcy proceeding, the funds paid will be construed by this court as a payment to secure the payment of past and future services rendered by the attorney in connection with the case, remain property of the estate, and are not earned fees and reimbursement for out-of-pocket expenses until approved by this court. See generally 11 U.S.C. §330, 331. Due to the apparent general confusion and variance in perceived definition, the mere use of the term "retainer" in such agreement shall not be construed as such clear expression of intent.

The payment of Forty-Thousand and No/100 (\$40,000.00) Dollars to the attorneys did not render the debtor incapable of operating the debtor's business and proceeding with reorganization. The fund remains property of the estate until awarded to the attorneys as compensation. The award of compensation~will be pursuant to notice and following hearing. This requirement provides adequate safeguards for the estate and other parties in interest. It is therefore ORDERED

excessive.

that the objection of the United States Trustee to the funds paid to and held by attorneys for the debtor in this consolidated Chapter 11 proceeding is overruled.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 1st day of March, 1990.